Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 46.

ARTHUR M. MANIGAULT, APPELLANT,

vs.

A. A. SPRINGS AND ST. J. M. LACHICOTTE, COPARTNERS IN BUSINESS UNDER THE FIRM NAME OF S. M. WARD & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF OF ARGUMENT OF

THEODORE G. BARKER,
Solicitor for Defendants-Appellees.

STATEMENT.

The Transcript shows all the record of the proceedings in this cause, except the Notice of a Motion for Injunction, the hearing of said motion, and the decision and opinion of the Circuit Judge, filed 22d June, 1903, refusing the Injunction.

The decision and opinion of his Honor, Circuit Judge Simonton, appears in the *Federal Reporter, vol.* 123, *p.* 708, *et seq.*

As that opinion deals at length with most of the questions which are raised by the Assignments of Error, on this appeal (which appeal is taken from the subsequent judgment of the Circuit Court, sustaining the Demurrer of defendants to the bill, and dismissing the bill), the appellees crave reference to that opinion, for the benefit of the light which it throws upon this case.

The Circuit Court, in sustaining the Demurrer, entered the following judgment (Transcript, fol. 34):

"This case came on to be heard on bill and demurrer. After reading the pleadings and hearing counsel thereon, without passing upon first ground of demurrer, as it is not necessary in view of the opinion I entertain on the bill, it is

"Ordered, adjudged and decreed, that all the other grounds of demurrer be sustained and the bill be dismissed."

The Bill of Complaint, in this case, seeks, from a Federal Court, an Injunction, to prevent the execution of a work, which has been authorized by an Act of the Legislature of the State of South Carolina, viz: the erection of a Dam across Kinloch Creek, in Georgetown County, in said State.

The purpose of the work, as declared by the Legislature in the Act, was the improvement of a large body of agricultural land, subject to overflow by high tides and freshets, making it necessary to erect a dam across Kinloch Creek to shut out from the land the overflow of such tides and freshets.

Kinloch Creek is said, in the Act, to be situated entirely in the County of Georgetown, in said State, and the lands bordering on said stream are almost entirely owned or controlled by defendants. See Exhibit "C" to Bill of Complaint (Transcript, fol. 16).

ARGUMENT ON THE ERRORS ASSIGNED BY COMPLAINANT.

First Error Assigned.

"That the Court erred in sustaining the demurrer therein and dismissing the bill. (Transcript, fol. 36.)

This assignment of error fails to specify any ground of error and cannot, for want of specification, be discussed.

Second Error Assigned.

"2. *That the Court erred in not holding that the enacting of the statute of the General Assembly of the State of South Carolina, approved 3 March, 1903, annexed as Exhibit 'C' to the bill of complaint, was the passing by the State of South Carolina of a law impairing the obligation of a contract, by annulling or attempting to annul and avoid the contract and covenant entered into by the defendants herein, with the complainant, in and by their agreement under seal referred to in, and annexed, as Exhibit 'B,' to the bill of complaint herein, and that such statute of the State of South Carolina was the passing of a law in contravention of the provisions of Article I., Section 10, of the Constitution of the United States.*" (Transcript, fol. 36.)

The Act of the Legislature of South Carolina, referred to in above assignment of error and attacked by the bill of complaint, as violating the Constitution of the United States, is as follows (Transcript, fol. 16-17):

"AN ACT *to Authorize the Construction and Maintenance of a Dam across Kinloch Creek, in Georgetown County.*

"Whereas, in order to drain certain lowlands in the County of Georgetown, which lands are subject to overflow by reason of high tides and freshets in the Santee River, it has become necessary to construct a dam across Kinloch Creek;

"And whereas, said creek is situated entirely in Georgetown County, and the lands bordering on said stream are almost entirely owned or controlled by A. A. Springs and St. J. M. Lachicotte, copartners in business under the firm name of S. M. Ward & Co.;

"And whereas, by reason of the drainage and protection of said lands from overflow, their taxable value will be greatly enhanced, and without the dam provided for in this bill a large part of the land bordering on said creek will eventually become abandoned and valueless, as some portions of it now are;

"And whereas, it is the purpose of the said parties to construct a good and sufficient floodgate, so as to allow the water to pass out of said creek;

"And whereas, the erection of a dam across Kinloch Creek is the ony feasible and practicable scheme for the drainage of said lands;

"And whereas, in order to remove any doubt as to the authority of A. A. Springs and St. J. M. Lachicotte, copartners, doing business as S. M. Ward & Co., to erect, construct and maintain a dam across said 'Kinloch Creek,' now

"Be it enacted by the General Assembly of the State of South Carolina:

"Section 1. That the right, power and privilege to construct, erect and maintain a dam across said Kinloch Creek is hereby authorized, granted and given to said A. A. Springs and St. J. M. Lachicotte, copartners, doing business under the firm name of S. M. Ward & Co., their heirs and assigns and the survivors of them or either of them: *Provided,* That the said A. A. Springs and St. J. M. Lachicotte, copartners, doing business under the firm name of S. M. Ward & Co., shall be liable for all such damages as may be established in any Court of competent jurisdiction by any landowner claiming that his land has been damaged by reason of the erection of said dam."

Did the Circuit Court err in *not* holding that the above Act of the Legislature of South Carolina was "a law impairing the obligation of a contract, in violation of Article I., Section 10, of the Constitution of the United States?"

Circuit Judge Simonton, in refusing the injunction in this case, answered this question thus (123 Fed. Rep., p. 719):

"Assuming that the contract was valid, does the Act of the Legislature with regard to it come in conflict with the Constitution of the United States, in that it impairs the obligation of a contract? It must be noted that the Act of Assembly makes no mention of and no allusion to any contract whatever. Apparently the Act was passed in the exercise of legislative authority, and under the police power of the State. We cannot inquire, as has been seen, into the motive which may have controlled the Legislature. The doctrine of *omnia presumuntur* applies to its acts. Assuming, then, that this Act was passed in the exercise of the legitimate power of the State, the rule laid down in the *Legal Tender Cases,* 12 Wall., at page 551, applies to this Act. *'As in a State of civil society property of a citizen, or subject, is subject to the demands of the sovereign, so contracts must be understood as made in reference to the*

possible exercise of rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.' So also, in *Mitchell* v. *Clark*, 110 U. S., 633, *'where the question of the power of Congress arises, it does not depend upon the incidental effects of its exercise on contracts, but on the existence of the power itself.'*

"It is well to examine this contract more minutely and ascertain precisely what it is. The defendants, without the authority of the State, in whom alone is the right to close a stream in this creek, had built a dam across Kinloch Creek, with a trunk and floodgate on each side thereof; the trunk and floodgate being on their own lands. The complainant and Mr. Ford objected. After notice of the objection and negotiations thereon, this contract was made. It is an indenture between these defendants, parties of the first part, and Manigault and Ford, parties of the second part. It recites that all the parties to the deed were owners of land on the Santee River, adjacent to or in the neighborhood of Kinloch Creek and White Oak Creek; that there are now—that is, at the date of the deed—banks across the said creeks, with a trunk on the bank across White Oak Creek, and a bank across Kinloch Creek, with a trunk and floodgate on each side thereof; that the parties of the second part claim that they have the right to keep open all the time and remove said bank and floodgate and trunks as obstacles to navigation, and to the free ingress and egress of the water, and to the parties themselves using the said creeks as highways, and that the parties of the first part object to such removal, and claim that they should not be removed. Then comes the consideration and the covenants. The important covenant is this:

" 'First. That from and after the 31st December, 1898, the said parties of the second part, Manigault and Ford, their agents, servants and employees, shall have the right to open and keep open all or any part of the said banks and trunks over and across the said two creeks, and to remove all or any part of the said banks and obstructions across the said creeks, so as entirely or to such an extent as they may see fit, to free and clear off said creeks, or either of them, from all or any part of such obstructions, without let, hindrance, objection, delay or molestation whatsoever, in act or procurement, by the parties of the first part, their servants, agents or employees.'

"Now this contract speaks of the then existing claim of right by the complainant and Ford to the removal of the then existing obstructions, and of the covenant of the defendants to remove the same. They were put up by defendants under a

claim of right in themselves to do this. This claim was abandoned and the obstructions in due time were thoroughly removed, without any let, hindrance, objection, delay or molestation by the parties of the first part whatsoever, or any of their servants, agents or employees. Has not this contract been performed? All that it binds the parties to do has been done. The obstruction has been entirely removed. Nothing is said of the future. But good faith requires that Ward & Company should not, having entered into this contract, proceed to repeat what Manigault and Ford complained of. They would subject themselves to the same proceedings, perhaps be met at once with an indictment for a nuisance. But, having abandoned all claim, in their own right, to erect such a dam, it does not prevent them from using, indeed from seeking, a legal authority for the erection of a dam. Their previous act being unlawful, they were exposed to a prosecution, or for damages.

"Now, however, the State has come in, and, by the exercise of her police power, has sanctioned the construction of the dam. The action of the defendants is no longer unlawful. The State has made it lawful; and, under the authorities quoted above, if the contract forbid a renewal of the erection of the dam, this did not preclude or prevent or include the acts of the State."

In *Charles River Bridge* v. *Warren Bridge,* 11 Peters, 419, where the claim was that a charter granted by the State to the Warren Bridge divested rights previously vested in the Charles River Bridge by its charter, *Justice McLean,* delivering the opinion of the Court, said:

"In all cases where private property is taken by the State for public use, the action is on the property, and the power, if it exists in the State, must be above the contract. It does not act on the contract, but takes from under it vested rights. And this power when exercised by a State does not in the sense of the Federal Constitution impair the obligation of the contract."

It will be noted that this was said of a grant, or contract, between the State herself and her grantee, creating vested rights in the latter. If even such a contract was not impaired by the subsequent exercise of "the rightful authority of government," divesting such vested rights, *a fortiori,* would a contract between private persons not be impaired by a law passed in the exercise by the State of her "legitimate authority." Such a law must, still more than in a case of the State's own

grant, be "above the contract," and must be held "not to act on the contract" at all.

Therefore the Act of the General Assembly of the State of South Carolina, approved March 3, 1903, authorizing the erection of a dam across Kinloch Creek, a stream wholly within her own borders, could not, and did not, impair the obligation of, or annul, or attempt to annul and avoid, "the contract and covenant," which had been, in 1898, entered into by the defendants with the complainants, and there was no error in the Circuit Court in holding that the Act did not operate on the contract at all, did not annul or avoid it, and was not a violation of the Constitution of the United States.

Third Error Assigned.

"3. *That the Court erred in not holding that the provisions of the Constitution of South Carolina declaring that all navigable waters should forever remain public highways was a right and privilege annexed to and constituting a part of the value of the lands and properties of the complainant, situated upon such navigable waters, and that the damming of Kinloch Creek, and its consequent closing as a navigable water highway, except for the purposes of the public health, the public welfare or the public safety, and after due compensation therefor, is a destruction of part of the value of the property of the complainant, given to him at the time of his acquisition thereof by the Constitution and laws of the State of South Carolina; and the passage of the said statute by the General Assembly of the State of South Carolina was an impairment of the obligation of the contract so entered into by the complainant when he was permitted to acquire said property, and is the taking of the property of the complainant without compensation therefor, and the depriving of the complainant of his property without due process of law, in contravention of Section* 1, *of Article XIV., of the Amendments of the Constitution of the United States.*" (Transcript, fol. 37.)

The fallacies contained in this assignment of error lie in the assumptions:

A. That Kinloch Creek is "a public highway;"

B. That "the provisions of the Constitution of South Carolina declaring that all navigable waters should forever remain public highways, was a right and privilege annexed to and

constituting a part of the value of the land and properties of the complainant, situated upon such navigable waters;"

C. That the damming of Kinloch Creek and its consequent closing as a navigable water highway, * * * is a destruction of part of the value of the property of the complainant;

D. That such alleged property was given to complainant by the Constitution and laws of the State of South Carolina, at the time of his acquisition thereof;

E. That a contract was so entered into by the complainant with the State of South Carolina when he was permitted to acquire said property;

F. That the passage by the Legislature of South Carolina of an Act authorizing the erection of a dam across Kinloch Creek was an impairment by the State of South Carolina of the obligation of the contract so alleged to have been entered into by the State with the complainant, when he was permitted to acquire said property;

G. That the passage of said statute is the taking of the property of the complainant without compensation therefor and the depriving of the complainant of his property without due process of law; and

H. That the closing of Kinloch Creek was not for the purpose "of the public welfare."

A.

Was Kinloch Creek "a navigable water highway?"

Circuit Judge Simonton, in deciding against complainant's motion for injunction in this case (*Manigault* v. *Ward & Co.*, 123 Fed. Rep., 708), deals with this question (on p. 712) thus:

"Is Kinloch Creek a navigable water of the United States or navigable under the laws of South Carolina? The distinction between these classes is seen in the *Montello*, 11 Wall., 411, * * * In order to make a stream navigable by the public it is not enought that it is floatable, that is, capable of floating vessels or other craft; it must be a public highway. To be a public highway it must have a terminus, *a quo* the public can enter it, and a terminus, *ad quem they can leave it.* (*Young* v. *Culbertson*, 1 MacQ. H. L. Cases, 453.) * * * On p. 714, it is said: 'Kinloch Creek, beyond this canal, loses itself in the land.' So there is no *terminus ad quem* for the public after entering it from the Santee, and it certainly is not a navigable

water of the United States. Is it a highway under the law of South Carolina? In Section 1335, Civil Code of South Carolina, it is declared, '*that all streams which have been rendered or can hereafter be rendered capable of being navigable, by rafts of lumber or timber by the removal of accidental obstructions, and all navigable water courses and cuts, are hereby declared to be navigable streams, and such streams shall be common highways and forever free as well as to the inhabitants of this State as to the citizens of the United States, without any taxes, etc.,*' as in the language of the Constitution above quoted. This Act does not change the definition of what are navigable waters. It only emphasizes the law already declared, that navigability does not depend upon the depth or width of a stream, nor upon the ebb and flow of the tide therein. It makes no new law, it declares the law."

B., C., D., E. and F.

Was "the provisions of the Constitution of South Carolina, declaring that all navigable waters should forever remain public highways," a right and privilege annexed to * * * "the lands and properties of the complainant situated upon such navigable waters?" and was "the damming of Kinloch Creek and its consequent closing as a navigable water highway * * * a destruction of part of the property of the complainant, given to him at the time of his acquisition thereof by the Constitution and laws of the State of South Carolina?"

It needs no elaboration of argument or authority to disprove the fallacy, that the general provisions of the Constitution of a State are or can become as against the State a right or privilege of an individual or be annexed to the land and properties of a private idividual, so as to become "part of his property," or that the right to such provision was given to him by the Constitution and laws at the time of his acquisition of his land, or the further fallacy, that such fancied right and privilege, so claimed to be annexed as an appurtenance to his land, are by force of such annexation protected to the owner as against the State by a contract obligation binding the State and restricting her in the exercise of her sovereignty.

That such declarations of the general law do not constitute a contract between the State and any of its citizens; that the general provisions of a State Constitution are not and cannot

become, as against the State, annexed to the land and properties of a private individual so as to become "part of his property;" that the right to such provisions are not "given to him by the Constitution and laws at the time of the acquisition of his land," and that such supposed right and privilege are not, by force of such supposed annexation to his property, protected to the owner by a contract obligation, binding the State and restricting her in the exercise of her sovereignty, is distinctly ruled, in principle, by this Court in the early case of *Jackson* v. *Lamphire*, 3 Peters, *280 (173), *decided in* 1830.

In that case counsel contended that an Act of the Legislature of the State of New York violated the provisions of the Constitution of that State, "which ordains, that 'the Legislature of this State shall at no time hereafter institute any new court or courts but such as shall proceed according to the course of the common law,'" and violated also that article of the State Constitution which ordained 'that a trial by jury, in all cases in which it hath heretofore been used in the Colony of New York, shall be established and remain inviolate forever,' and that, "for these violations of the State Constitution, as on general principles, the statute complained of was a statute which impaired the obligation of contracts," but the Court say:

"The plaintiff insists that the patent to John Cornelius creates a contract with the grantee, his heirs and assigns, that he should enjoy the land therein granted free from any legislative regulations to be made in violation of the Constitution of the State; that the Act in question does violate some of its provisions, and therefore impairs the obligation of the contract.

"The Court are not inclined to adopt this reasoning, or to consider this, as fairly coming within the clause of the Constitution relied on by the plaintiff. The only contract made by the State is a grant to John Cornelius, his heirs and assigns, of the land in question; the patent contains no covenant to do or not to do any further act in relation to the land, and we do not, in this case, feel at liberty to create one by implication. The State has not by this Act impaired the force of the grant. * * * Presuming that the laws of New York authorized a soldier to convey his bounty land, before receiving a patent, and that, at the date of the deeds, there was no law compelling the grantee to record them, they would take priority from that

date. This is the legal result of the deeds, but there is no contract on the part of the State that the priority of title shall depend solely on the principles of the common law, or that the State shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of the State Legislature to pass recording Acts, by which the elder grantee shall be postponed to a younger, if the prior deed be not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the Act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass Acts of limitations and their effect. * * * Whether it is considered as an Act of limitatons, or one in the nature of a recording Act, or as a law *sui generis*, called for *by the public situation of that part of the State*, we are unanimously of opinion that it is not a law which impairs the obligation of a contract." (3 Peters, 280.)

It has been repeatedly held in cases, in which this Court has time and again refused to entertain jurisdiction of the question of the constitutionality of State legislation, closing or changing the course of a navigable stream, wholly within the borders of a State, that the authority of the State government over such navigable streams for the purposes of public improvements is to be respected as essential to the welfare of the community and to the rights of the States; and it has also been held, that the surrender by the State of such authority, or of any power of the like character, can never be implied or presumed, but must be so clearly expressed as to admit of no doubt.

In *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420, it was said:

"The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. * * * A State ought never to be presumed to surrender this power * * * and when a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation * * * the community have a right to insist, in the language of this Court (Chief

Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet., 514), that 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value if by implications and presumptions it was disarmed of the powers necessary to accomplish the end of its creation. * * * The rule of construction announced by the Court was not confined to the taxing power, nor is it so limited in the opinion delivered; on the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power then in question; and" (italics ours) *"whenever any power of the State is said to be surrendered or diminished*, whether it be the taxing power, *or any other affecting the public interest*, the same principle applies, and the rule of construction must be the same."

It was contended on Circuit, by counsel for appellant, and we suppose it will be re-asserted here, that the complainant had, as riparian proprietor on navigable waters in the vicinity of Kinloch Creek, a vested right to have Kinloch Creek kept open; that the State, by the provision in the general law declaring that navigable waters shall forever remain public highways, has resigned to the riparian proprietor its power over navigable streams; and that a contract between the State and such riparian proprietor, that the State would never close Kinloch Creek, was to be implied from such declaration; but, in the *Charles River Bridge* case, the Court said:

"Amid the multitude of cases which have occurred and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for. * * * The Court cannot deal thus with the rights reserved to the States; and, by legal intendments and mere technical reasoning, take from them any portion of *that power over their own internal police and improvement which is so necessary to their wellbeing and prosperity.*" (Italics ours.)

In *Bird* v. *Smith* (Penn., 8 Watts, 434), 34 Am. Dec., 484, it was held, that

"Over the surface of a public river riparian owners have no peculiar right. Such is the principle of *Carson* v. *Blazer*, 2 Binn., 475; S. C., 4 Am. Dec., 463, and *Shrunk* v. *The Schuylkill Navigation Company*, 14 Serg. & R., 71, which seem to

have put the public right of navigation and fishery on the same footing. * * *"

In *Atkinson* v. *Philadelphia and Trenton R. R. Co.*, 2 Peters, 252, Note 1; *Field* v. *Same*. Bills on the equity side of the Court praying injunction to restrain defendant from erecting a bridge over the Neshaminy Creek, being constructed under color of an Act of Assembly to the great injury of plaintiff.

Atkinson alleged that he is a citizen of New Jersey, employed in transporting articles by water to and from different places, owning five schooners; that he had recently in the course of such business made a contract with Anthony Taylor, who resides on the Neshaminy River, in Bucks County, Pa., to deliver to him 1,000 bushels of lime at his wharf, about two miles from the mouth of said river, which is by law a public navigable river or highway for the free passage of vessels up and down the same. That defendants, under color of an Act of Assembly of this State, * * * are about to construct a permanent bridge across said stream near its mouth, where it is navigable for sea vessels, and thence to the farm of said Taylor. * * * That, neither by the laws of Pennsylvania, nor the Constitution of the United States, can any obstruction be placed across said stream; that it is contrary to law to interfere with the full free navigation thereof, for the accommodation of the inhabitants on said river as well as all the citizens of the United States who may have occasion to pass and repass on the same with any masted vessels. That the Act of the Legislature gives no authority to erect such a bridge * * * or any bridge which shall in any way impede the full and free navigation of said river, and complainants asked an injunction to restrain such erection.'

The Court, by *Baldwin, Justice,* say:

"The complainant asserts no right of property in the bank or the bed of the river; his claim to the interposition of the Court rests on his contract with Mr. Taylor for the delivery of 1,000 bushels of lime at his wharf above the contemplated bridge, and on the common right of navigation resulting from the Act of Assembly declaring the Neshaminy a public navigable river. * * *

"Laws in relation to roads, bridges, rivers and other public

highways, which do not take away private rights of property, may be passed at the discretion of the Legislature, however much they may affect common rights. * * *

"The injuries to be compensated are those which are done *to property immediately.* * * *

"Compensation shall be made for all damages for immediate injury to property, but not for any damage, where there is no legal injury, which is called *damnum absque injuria*—as the loss of a fishery. * * * No property has been taken from him; he had no property in the fish, or the river. * * * We must consider these adjudications of the Supreme Court of the State as establishing the general principle that the right to the use of the navigable streams, which are public highways, either for fishing or navigation, is subordinate to laws, which regulate its general public and internal concerns, and that *no common right in the common property is considered as private property,* or *the subject of individual ownership.*" (The italics are ours.) "No case has yet occurred in which an injunction has been granted in favor of an individual who claims only *a common right, in which he can have no private property;* nor can we conceive one in which it would be justified, unless it was accompanied with an obstruction or destruction of private property. The injury, too, must be what is deemed in equity as irremediable, a permanent appropriation of the property of the complainant to the use of the defendants, a destruction or total loss consequent on the act to be done, * * * if the injury is susceptible of perfect pecuniary compensation, if the ordinary legal remedy in Courts of law can afford adequate satisfaction, it is not in the sense of the law irreparable; 'it must reach to the very substance and value of the estate going to its destruction in the character in which it is enjoyed.'"

G.

The assignment of error with which we are dealing assumes that the closing by the State of Kinloch Creek by the erection of a dam across it and the cutting off from the complainant as one of the public the navigation of said creek, was "the taking of his property, and asserts that such taking was without compensation therefor.

We have shown, by authority, that complainant had no such property; that there was no such taking of his property in contemplation of law; but even if it could be so construed, the State, in closing Kinloch Creek, did not leave complainant

without protection or compensation for whatever damage or injury he might suffer thereby. The Act expressly provides that defendants, the parties who might be benefited directly by the improvement and to whom the right to erect and maintain the dam is granted, shall be liable for all such damages as may be established in any Court of competent jurisdiction by any land-owner claiming that his land has been damaged by reason of the erection of said dam.

H.

The last of complainant's erroneous assumptions to be noticed in his *third* assignment of error, is, that the closing of Kinloch Creek by the State was not "for the purpose of the public welfare."

The Act of Assembly (Transcript, fol. 16) declares in its Preamble:

"Whereas, in order to drain certain lands in the County of Georgetown, which lands are subject to overflow by reason of high tides and freshets in the Santee River, it has become necessary to construct a dam across Kinloch Creek; * * *

"And whereas, by reason of the drainage and protection of said lands from overflow, their taxable value will be greatly enhanced, and, without the dam provided for in this bill, a large part of the land bordering on said creek will eventually become abandoned and valueless, as some portions of it now are. * * *"

Here is a plain declaration of the Legislature that the erection of the dam was for the purpose of the public welfare, which would be secured by reclaiming a body of lowlands and enhancing their taxable value, thus adding to the wealth and prosperity of the State.

That it would tend to benefit also the individual land-owners, who would bear the cost of erecting and maintaining the dam, in no wise detracted from the benefit which the Legislature of the State in its wisdom decided would accrue to the public from the improvement.

Fourth Error Assigned.

"4. *That the Court erred in not holding that the complainant, as the owner of property abutting on a navigable stream,*

to wit: Kinloch Creek, had, as part of his private property, the right of riparian owner, to wit: the right of unobstructed passage to and from his said property on and over the waters of Kinloch Creek, and that the closing of Kinloch Creek by the passage of the said statute, and the loss of access thereby to the property of the complainant and the consequent damage to the lands of the complainant abutting on or contiguous to said Kinloch Creek, is the taking of the (property of the) complainant without his consent, and without compensation therefor, in contravention of the provisions of Article I., Section 10, of the Constitution of the United States, and of Section 1, of Article XIV., of the Amendments to the Constitution of the United States, and of Section 17, Article I., of the Constitution of South Carolina." (Transcript, fol. 37.)

Is the complainant a riparian owner on Kinloch Creek?

The Act of the General Assembly of the State of South Carolina, which appears in the *Transcript* (*folio* 16), as *"Exhibit C"* to the Bill of Complaint, states that "the lands bordering on said stream are almost entirely owned or controlled by" the defendants, and no other persons are mentioned as riparian owners on Kinloch Creek.

Again, the "diagram" (*Transcript, fol.* 11), annexed to the Bill of Complaint, as "Exhibit A," shows the "lands of A. M. Manigault" (the complainant) as lying on Minim Creek, into which Kinloch Creek coming from above, empties, the mouth of Kinloch Creek being in Minim Creek, above the red line which marks the boundary of the lands of complainant, A. M. Manigault. The utmost that can be said, from the diagram of complainant, is, that the mouth of Kinloch Creek is in Minim Creek, opposite to the "lands of A. M. Manigault." This does not put the lands of Manigault, at any point, on the banks of Kinloch Creek, or constitute complainant a riparian owner on Kinloch Creek. To reach Kinloch Creek, complainant, Manigault, according to his own diagram, must leave his lands on the left bank of Minim Creek, and crossing that stream, enter the mouth of Kinloch Creek, between the lands of *defendants* on either bank of Kinloch Creek. The lettering on the diagram is accidentally so placed as make the right bank of Kinloch Creek seem to stretch down to the Santee River at the mouth of Minim Creek, by the the letters

"Ki" in the word *"Kinloch"* being placed below the junction of Kinloch Creek and Minim Creek, and below the mouth of Kinloch Creek, while the left bank of Kinloch Creek ends at Minim Creek. The fact being that after Kinloch Creek reaches and empties into Minim Creek, Kinloch Creek ends, and the banks of the stream, below that point, are the banks of Minim and not of Kinloch Creek. The complainant is a riparian owner of lands "abutting on" Minim Creek, but not a riparian owner of lands "abutting" on Kinloch Creek. He has no right of riparian ownership on Kinloch Creek. His right of riparian ownership, which he claims as "part of his private property," is on Minim Creek. His right to the unobstructed passage to and from his property on Minim Creek is on and over the water of Minim Creek, and that right is unobstructed.

We have already shown, however, that riparian ownership gives no property in the stream or over the surface, and that "no common right in the common property is considered private property or the subject of individual ownership." (*Atkinson* v. *Phila., &c., R. R. Co.*, 2 Peters, 252; *Bird* v. *Smith, supra.*) The right of navigation which complainant claims in the water of Kinloch Creek is only that to which he would have been entitled as one of the public. It follows that "the closing of Kinloch Creek" by the passage of the said statute was *not* "the taking of the property of the complainant without his consent, and without compensation therefor;" that it was *not* "in contravention of the provisions of Article I., of Section 10, of the Constitution of the United States," or of Section 1, of Article XIV., of the Amendments to the Constitution of the United States * * *" as alleged in the assignment of error.

JURISDICTION.

The 4th, 5th, 6th, 7th and 8th assignments of error attempt to raise questions whether the statute passed by the State of South Carolina, approved March 3, 1903, for stopping Kinloch Creek by a dam, violated the Constitution and laws of that State.

Those questions give no foundation for the jurisdiction of the Federal Courts in this case.

Whether the statute authorizing the erection of a dam across Kinloch Creek, lying wholly within the County of Georgetown, in the State of South Carolina, was or was not "in contravention of Section 17, Article I., of the Constitution of South Carolina;" whether or not it was "a statute passed for the private purposes of the defendants;" whether it was "not a statute passed in the exercise of any of the police powers of the State for the public health, the public welfare or the public safety, or for any public purpose whatever;" whether or not "the enactment of the aforesaid statute, approved March 3, 1903, by the General Assembly of the State of South Carolina, was the enacting of a local and special law, concerning the opening of highways," and was or was not in contravention of Article III., Section 34, Subdivision II., of the Constitution of the State of South Carolina; and was or was not in contravention of Article III., Section 34, Subdivision XI., of the Constitution of the State of South Carolina; and whether or not the passage of said statute was in contravention of the Code of Laws or of the Revised Statutes of South Carolina, are all questions which belong wholly to the Legislature and to the Courts of that State, and are not matters of which the Courts of the United States will entertain jurisdiction.

This doctrine has been maintained with conspicuous emphasis in an unbroken line of decisions from the *Blackbird Creek Marsh Company* case, in 2 Peters, down to the case of *McCain* v. *Des Moines,* 174 U. S., and cases still more recent.

In *Thompson Willson* v. *Blackbird Creek Marsh Co.,* 2 Peters, 244 (245), Chief Justice Marshall, delivering the opinion of this Court, said:

"The Act of Assembly of the State of Delaware, by which the construction of the dam erected by plaintiffs was authorized, shows plainly that this is one of those many creeks passing through a deep, level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property must be much enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by the Act stops a naviga-

ble creek, and must be supposed to abridge the rights of those who have been accustomed to use it; this abridgement, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance."

The *Blackbird Marsh* case was soon followed by that of *Atkinson* v. *Philadelphia & Trenton R. R. Co.,* reported in the same volume (2 Peters, 252, Note 1), which we have cited above on another point, and in which this Court declared that

"State laws on the subject of turnpike roads, fences, bridges, etc., are a part of the system of internal commerce and police of the respective States, the regulation of which they have reserved to themselves without any control by Congress (9 Wheaton, 208; 2 Ib., 443; 9 Johns., 560, 564, 573; 4 Wash. C. C., 378; *Bennett* v. *Boggs,* Bald., 60); and no law on these subjects is prohibited by the Constitution of the United States, unless it impairs the obligation of a contract. (2 Pet., 410.) * *

"The Legislature had the power to authorize the erection of a dam or causeway which would stop the navigation, if in their opinion it was conducive to the public welfare; whether it would be a discreet exercise of their power is not for this Court to decide, as the whole subject is clearly within their discretion, which the judicial power cannot control. (3 Pet., 412; 4 Ib., 593-4; 4 Wheat., 428; 8 Pet., 729.) * * *

"We can take no judicial cognizance of any special injury by any citizen of this State or any general inconvenience to which the people on the Neshaminy or its vicinity may be subjected on account of the bridge; those are exclusively the subjects of the judicial cognizance of the Courts of the State. * * *"

In *Charles River Bridge* v. *Warren Bridge,* 11 Peters, 419, *McLean, Justice* (speaking of the power of the State to take private property), said:

"Is there any power that can control the exercise of this discretion by the Legislature? I know of none, either in the State or out of it; but it must be exercised in subordination to the provisions of the State Constitution. And if not so exercised, the judicial authority of the State, only, between its own citizens, can interfere and prevent the wrong or repair it in damages. * * *

"If to take private property impairs the obligation of the contract under which it is held, this Court may be called on to determine, in almost every case, where the power is exer-

cised, as well when compensation is made as when it is not made. For if this Court can take jurisdiction on this ground, every individual whose property is taken has a constitutional right to the judgment of this Court, whether compensation has been made in the mode prescribed by the Constitution of the State. * * * To revise these cases would carve out for this Court a jurisdiction not contemplated by the Constitution and which cannot safely be exercised."

In *Jackson* v. *Lamphire* (1830), 3 Pet., *280 (173), it was held that, under the 25th Section of the Judiciary Act (1 Stat. at Large, 85):

"This Court cannot declare an Act of the State Legislature void because it conflicts with the Constitution of the State."

In *Medbury* v. *Ohio,* 24 How., 413, this Court said:

"The only question presented to the" (Ohio Supreme) "Court and decided by them, was whether the provisions of the Act of 1845 were consistent with the new Constitution.

"This is a question of which this Court can take no judicial cognizance."

In *Porter* v. *Foley,* 24 How., 415, held:

"The chief and only question in this case was whether an Act of Assembly of Kentucky * * * was a valid exercise of power by the Legislature. * * *

"The Supreme Court of Kentucky decided that it had such power under the Constitution of the State, and it is abundantly evident that there is no article or clause of the Constitution of the United States which could interfere with it."

In *Withers* v. *Buckley,* 20 How., 84, held, that

"Where it is alleged that the Constitution of a State declares that private property shall not be taken for public uses, and that the highest Court of the State has sustained the validity of a law which violates this constitutional provision, this Court has no power to review that decision.

"The 5th Article of the Amendment of the Constitution of the United States was inteded to prevent the government of the United States from taking private property for public use without compensation, and was not intended as a restraint upon the State governments. * * *

"A law of the State of Mississippi, which diverted a stream from plaintiff's land, 'which stream plaintiff and his grantors have ever enjoyed, and used the water flowing through his and their land for agricultural and domestic purposes and for navi-

gation and in transporting their crops to market and receiving their supplies therefrom. * * *'

"Bill of complaint charged that the law of Mississippi was invalid in not providing compensation for the injuries to him, in violation of the Constitution of the State and United States and of the Act of Congress of March, 1817, which authorized the people of Mississippi to form a Constitution, and of the Ordinance of 1817, passed in pursuance of the Act of Congress, 'both the Act of Congress and the Ordinance providing that the Mississippi River and the navigable rivers leading into the same shall be common highways and forever free as well to the inhabitants of Mississippi as to the other citizens of the United States.' "

Mr. Justice Daniel, delivering the opinion of the Court, said:

"The Act of Congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into it could not have been designed to inhibit the power, inseparable from every sovereign and efficient government, to devise and execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers, in the interest of the State, or might be productive of changes in the value of private property. Such consequences are not infrequently and indeed inevitably incident to public and general measures, highly promotive of and absolutely necessary for the public good. * * *

"The Act of the Legislature of Mississippi therefore is strictly within the legitimate and essential powers of the State, is in violation neither of the Constitution nor laws of the United States, and presents no conjunction or aspect by which this Court would be warranted to supervise or control the decree of the High Court of Errors and Appeals of Mississippi."

The State of Pennsylvania and Wheeling and Belmont Bridge Co., 18 How., 421, held:

"In respect to these purely internal streams of a State, the public right of navigation is, exclusively, under the control and regulation of the State Legislature; and in cases where these erections or obstructions to the navigation are constructed under a law of the State, or sanctioned by legislative authority, they are neither public nuisance, subject to abatement, nor is the individual who may have sustained special damage entitled to any remedy for his loss. So far as the public stream is con-

cerned, the Legislature having the power to control and regulate it, the statute authorizing the structure makes it lawful. (5 Wend., 448, 449; 15 Ib., 113; 17 T. R., 195; 20 Ib., 90-101; 5 Cow., 165.)"

Lake Shore and Michigan Railway v. *Ohio* (1896), 165 U. S., 365:

"That full power resides in the State, as to the erection of bridges and other public works in navigable streams, wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined," citing *Willson* v. *Blackbird Creek Co.*, 2 Pet., 245; *Withers* v. *Buckley*, 20 How., 84; *Cardwell* v. *American Bridge Co.*, 113 U. S., 205; *Wilamette Bridge Co.* v. *Hatch*, 125 U. S., 1; *Shively* v. *Bowlby*, 152 U. S., 1 (and authorities therein cited).

Sennot v. *Davenport*, 22 How., 244:

"State laws have always been upheld by this Court, except where they were in conflict, or were adjudged by the Court to be in conflict, with the Acts of Congress," citing 2 Woodbury's Writings, 221; Woodbury and Minot's Rep., 401-451; 12 Wheaton, 441; 3 How., 230; *Milner* v. *R. R. Co.*, 6 Am. L. Rep., 9.

Transportation Co. v. *Chicago*, 99 U. S., 635:

"A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances. * * * An abridgement of the right of those who have been accustomed to use them, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of the State and its citizens, of which this Court can take no cognizance. *Willson* v. *Blackbird Creek Co.*, 2 Peters, 250. In numerous instances States have authorized obstructions in navigable streams."

Pound v. *Turk*, 95 U. S., 459:

"1. In the absence of legislation by Congress bearing on the case, a statute of a State, which authorizes a dam across a navigable river, which is wholly within her limits, is not unconstitutional.

"2. A party is not liable for obstructing the navigation of the river by means of a dam which he has erected under the authority and pursuant to the requirements of such a statute."

Mr. Justice Miller, delivering the opinion of the Court, said:

"The Blackbird Creek case (2 Pet., 245) is directly appli-

cable to the one before us, and, as it has never been overruled, but, on the contrary, though much criticised, has always been sustained, it is alone sufficient to control this one."

Cites *Cooly* v. *Board of Wardens,* 12 How., 299; *Willson* v. *Blackbird Creek Co.,* 2 Pet., 245; *Gilman* v. *Philadelphia,* 3 Wall., 713; *Crandall* v. *State of Nevada,* 6 Wall., 35.

In *Caldwell* v. *Bridge Company,* 113 U. S., 205, the doctrine that in the absence of legislation by Congress a State may authorize a navigable stream within its limits to be obstructed by a bridge, etc., is reasserted and the previous cases to that effect affirmed.

There was a bill in equity to enjoin maintenance of a bridge. A demurrer to the bill was sustained and the bill dismissed.

Previous cases cited and affirmed, viz: those cited above in *Pond* v. *Turk;* also *Escabana* v. *Chicago,* 107 U. S., 178, and *Miller* v. *Mayor of New York,* 109 U. S., 385.

Miller v. *Mayor of New York et al.,* 109 U. S., 385, held:

"The bridge being constructed in accordance with the legislation of both the State and Federal governments, must be deemed a lawful structure; * * * and however much it may interfere with the public right of navigation in the East River, and thereby affect the profits or business of private persons, it cannot on that ground be the subject of complaint before the Courts. * * *

"The plaintiff" (p. 395) "is not deprived of his property, nor of the enjoyment of it; nor does he from that cause suffer any damage different in character from the rest of the public."

After citing and approving the ruling in the *Wheeling Bridge* case (18 How., 430), the Court say:

"The case of *Gilman* v. *Philadelphia,* 3 Wall., 713, is much stronger than the *Wheeling Bridge* case, and is conclusive against the pretensions of the plaintiff. It there appeared that a bridge was about to be built over the Schuylkill River, and under the authority of an Act of the Legislature of Pennsylvania, when a party owning valuable coal wharves, just above Chestnut street, filed a bill to prevent its erection, alleging, as in the present case, that it would be an unlawful obstruction to the navigation of the river, and would be a public nuisance, inflicting upon him special damage, and claiming that he was entitled to be protected by an injunction to restrain the progress of the work, and to a decree of abatement should it be completed. The river was tide-water, and navigable to the wharves

of plaintiff by vessels drawing from 18 to 20 feet of water; and, for years, commerce to them had been carried on in all kinds of vessels. The bridge was to be only 20 feet high, and without draws, and of course would cut off all ascent above it of vessels carrying masts. The city justified its intended action under the Act of the Legislature. * * * The Court below dismissed the bill, and this Court affirmed its decree, holding that, as the river was wholly within her limits, the State could authorize the construction of a bridge, until Congress should by appropriate legislation interfere and assume control of the subject."

The case of *Escabana Co.* v. *Chicago*, 107 U. S., 678, follows the decision in *Gilman* v. *Philadelphia*, and is equally pointed and decisive.

Leovy v. *United States*, 177 U. S., 621 (1899), held that

"Subject to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana * * * had full power to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits.

"The dam constructed by the plaintiff in error at Red Pass was constructed under the police power of the State and within the terms and purposes of the grant by Congress."

Mr. Justice Shiras, in delivering the opinion of the Court, said:

"We think therefore that we are warranted in regarding the dam in question as constructed under the police power of the State, and within the terms and purposes of the grant by Congress. There was evidence tending to show the character of the country affected by floods from Red Pass—that it was swamp land and sea marsh from the Mississippi River to the Gulf. The testimony showed that the closing of this pass has resulted in the redemption of large tracts of land, greatly increasing their value; * * * and that if those passes are kept closed for five years more it will be worth three times as much, and that if this pass be opened again by the removal of the dam, the Orange property will be ruined. * * *"

After citing *Withers* v. *Buckley*, 20 How., 84, the Court quoted the following from *Barbier* v. *Conolly*, 113 U. S., 27:

"Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other Amendment, was designed to

interfere with the power of the State, sometimes termed its 'police power,' to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

The Sixth and Seventh Assignments of Error.

"6. That the Court erred in not holding that the enactment of the aforesaid statute, approved March 3, 1903, by the General Assembly of the State of South Carolina, was the enacting of a local and special law, concerning the opening of highways, and was in contravention of Article III., Section 34, Subdivision II., of the Constitution of South Carolina.

"7. That the Court erred in not holding that the enactment of the aforesaid statue, approved March 3, 1903, by the General Assembly of South Carolina, was the enacting of a local and special law, and was in contravention of Article III., Section 34, Subdivision XI., of the Constitution of the State of South Carolina." (Transcript, fol. 38.)

These assignments present no Federal question. They involve matters which belong exclusively to the jurisdiction of the State Courts. They repeat the like points taken in the bill, which might have been disregarded by the Circuit Judge on the motion for injunction, as not within the jurisdiction of a Federal Court. He saw fit to consider them, and his answer to them is found in his opinion in *Manigault* v. *Ward,* 123 Fed. Rep., on p. 717, thus:

"Another objection to this Act is, that it is a local and special law, and in conflict with Sec. 34, Art. III., of the Constitution of the State. This section forbids local and special laws in ten particulars not applying to this case, and adds: 'In all other cases when a general law can be made applicable no special law shall be enacted.' The evils which this Act we are now considering sought to remedy are peculiar and exceptional. As far as the case discloses, Kinloch Creek runs through lands suitable for rice culture, and for that only. Consequently they are very low, easily flooded, subject to overflow by any abnormal tide or freshet. It is in close connection with Santee River. In that river, when any high tide is met by the descending stream, especially during a freshet, the water comes up into Kinloch Creek, and submerges all the adjacent fields. Thus, the crops sown there are constantly liable to overflow and destruction. To prevent this a freshet bank had been constructed on adjacent plantations, one end resting on

Santee River and passing over the lands of the defendants, which was intended to meet and counteract this influx of water. To make this freshet bank continuous and effective, it must cross Kinloch Creek. No general law could meet the evil, because the conditions are exceptional. The Act in question does not infringe this constitutional requirement."

The Eighth Assignment of Error.

Is the Act of Assembly of the State of South Carolina invalid because none of the pre-existing conditions for its consideration by the General Assembly required by Sections 31 and 34, Art. III., of the Civil Code of South Carolina, were fulfilled? (Transcript, fol. 38.)

This question is not a Federal question, and might well have been rejected by the Circuit Court as beyond its jurisdiction and a matter exclusively for the Courts of the State, but the Circuit Judge, on the plaintiff's motion for injunction, chose to consider it, and he has fully answered it in his opinion in *Manigault* v. *Ward et al.*, 123 Fed. Rep., on pp. 715, 716, 717, thus:

"In the case at bar there is no constitutional requirement which has been violated. The provisions of an Act of a preceding Legislature have not been followed in the matter of notice required by the Act. Does this make this Act invalid? The legislative power in South Carolina is vested in the General Assembly. Each General Assembly possesses all these powers, and is subject to no limitation not found in the Constitution. One Legislature, therefore, cannot control or enlarge the power of any succeeding Legislature unless, indeed, within its constitutional powers, a Legislature has entered into a contract with a third party. Such a contract is protected under the Constitution of the United States. When, therefore, one General Assembly passes an Act like this in question, declaring that no bill shall be introduced or entertained in either House of the General Assembly unless certain prerequisite conditions are fulfilled—conditions not existing in the Constitution—it assumes a power which it does not possess. If, notwithstanding, any succeeding General Assembly shall receive and entertain a bill which has not fulfilled these conditions, this action on its part is either a declaration of its independence of these restrictions, or it is a repeal of the previous Act, *pro tanto*. 'Acts of Parliament,' says Blackstone (1 Bl. Comm.,

90), 'derogating to the power of subsequent Parliaments bind not.' See, on this subject, Cooley on Constitutional Limitations (4th Edit.), p. 152 (*126), Note 3."

On all the points assigned, the Circuit Court committed no error in sustaining the demurrer to the bill of complaint, and the bill should be dismissed.

THEODORE G. BARKER,
For Defendants-Appellees.